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No. 92-1676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRY C. KAUFMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In light of clear Congressional intent and statutory language that law enforcement agents engaged in an attempted money laundering "sting" operation under United States Code Title 18, section 1956(a) (3) (B) must unequivocally represent that the money used for the transaction is proceeds of specified illegal activity, did the United States Court of Appeals for the Seventh Circuit eviscerate the representation element and conflict with Congressional intent and the plain language of the statute by holding that criminal liability attaches regardless of the representations made if the defendant believes the money is the proceeds of specified unlawful activity?

II. Was Kaufmann denied his Sixth Amendment right to confront a government informant as to the informant's motive and bias due to potential criminal charges against the informant?

LIST OF ALL PARTIES

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were the United States of America and Harry C. Kaufmann.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Harry C. Kaufmann, respectfully prays that this Court issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered on February 2, 1993.

OPINION BELOW

The opinion in the United States Court of Appeals for the Seventh Circuit is *United States* v. *Kaufmann,* 985 F.2d 884 (7th Cir. 1993), which is reproduced in the appendix to this petition. Relevant excerpts from the district court's order, *United States* v. *Kaufmann,* No. 90-CR-172 (E.D. Wis. May 31, 1991), also are reproduced in the appendix.

JURISDICTIONAL GROUNDS

The judgment and decision sought to be reviewed was entered in the United States Court of Appeals on February 2, 1993. This Court has jurisdiction to review that decision by writ of certiorari pursuant to United States Code Title 28, section 1254(1).

STATUTE INVOLVED

Petitioner was convicted of violating United States Code Title 18, section 1956 (a) (3) (B), which in relevant part provides as follows:

> Whoever, with the intent —
>
> . . .
>
> (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; . . .
>
> . . .
>
> conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

STATEMENT OF THE CASE

Petitioner Harry C. Kaufmann owns Harry Kaufmann Motorcars, Inc., a Milwaukee, Wisconsin, automobile dealership specializing in luxury and exotic automobiles such as Excaliber, DeLorean, Zimmer and Mercedes-Benz. Among his business acquaintances was a man named Thomas Schafer.

Schafer became aware that federal authorities were investigating him with regard to passing 1.5 million dollars in counterfeit money. In the hope of receiving some consideration in connection with any resulting criminal charges, Schafer agreed to assist the Internal Revenue Service (IRS) with a "sting" operation directed at Kaufmann.

Schafer's role in the sting was to tell Kaufmann about his "friend," Tom Ryder, who actually was IRS Special Agent Greg Myre. In a series of conversations with Kaufmann, some of which were tape recorded, Schafer told Kaufmann that Myre lived in Minneapolis and wanted to purchase a Porsche 911 in a cash sale with the car titled in another person's name. Kaufmann agreed to sell the Porsche for $40,000.

The details of the communications between Kaufmann and Myre, particularly the inexplicably unrecorded conversations, are in dispute. Kaufmann and Schafer testified to contradictory versions of what information Schafer provided to Kaufmann in the unrecorded contacts. The initial plan was to have Schafer tell Kaufmann that he had a friend in the narcotics business who had narcotics money and was interested in purchasing a classic automobile, but not in his own name. Myre testified at trial that he understood Kaufmann would know that he (as Ryder) was a drug dealer and was using drug money for the automobile purchase. Myre himself never told Kaufmann that he (as Ryder) was a drug dealer or that he was using drug money, but he fully expected that Schafer made those representations to Kaufmann:

> Q. All right. Tell us as best you can recall what was the game plan?
>
> A. The game plan was initially to have Mr. Tom Schafer through a letter that I had composed to contact Mr. Kaufmann and express to him that he had a friend, individual, who was engaged in the narcotics business who had narcotics money who was interested in purchasing a classic automobile but he didn't want anything in his name, and he wanted to title it in somebody else's name. Mr. Schafer was then to meet with Mr. Kaufmann and transpose these ideas with the letter I had written and then set up a future time when I could meet with Mr. Kaufmann if Mr. Kaufmann was willing to be involved in that type of situation. At that time I was to go in and meet with Mr. Kaufmann and attempt to purchase the car and give him the money. The money at that time we couldn't release

it, so at some time during the operation while I was in with Mr. Kaufmann the meeting had to be stopped because we would not release the money to him.

Q. Did you know before you went into Mr. Kaufmann's office that Tom Schafer had never told Harry Kaufmann that you in your undercover role were bringing in drug money?

A. No. My understanding — my understanding was that he was aware that I was a drug dealer and would be bringing in drug money.

Q. So if that didn't happen, then the game plan was out of sync, is that right?

A. Could you rephrase that, please?

Q. Well, if Schafer never told Mr. Kaufmann that you in your undercover role were bringing in money that you had earned from drug transactions, then the game plan was blown, wasn't it?

A. No, I don't believe so.

Q. Well, isn't it required that Mr. Kaufmann have knowledge that the cash that you were fronting for this deal was in fact the proceeds of some illegal enterprise?

A. Yes, he would have to know or have a belief that the money that was brought in regarding this transaction had come from narcotics dealing.

Schafer also admitted that he never expressly told Kaufmann that Myre was a drug dealer using drug money. His initial story to Kaufmann was that Myre was going to be in Milwaukee for a big real estate transaction, and that he did not want the automobile titled in his own name because he was going through or had just finished a divorce. Later he referred to Myre as a "low profile marijuana dealer." In response, Kaufmann said that when he was young he had supported himself by "dealing coke and crystal."

The IRS gave Schafer a letter, purportedly from "Ryder," setting forth four criteria for the sale: a cash sale, in someone else's name, with his name never coming out and with Kaufmann being "cool" about "Ryder's" business. Schafer showed the letter to Kaufmann, who indicated that he was willing to title the car in someone else's name provided he saw two forms of identification.

On March 29, 1990, Myre and agent Rich Ahern, posing as Rich Adams, went to Kaufmann Motorcars, ostensibly to purchase the automobile. Myre carried a briefcase containing approximately $45,000 to $50,000 in cash. Kaufmann and Myre discussed the necessity that a Form 8300 be filed, as required by the IRS whenever a transaction involves more than $10,000 in cash. Kaufmann told the agents that he absolutely had to file the form. As Kaufmann began to prepare the sale forms, IRS agents entered the office and pretended to arrest Myre and Ahern.

Nearly six months later, a grand jury indicted Kaufmann on four counts of money laundering in violation of United States Code Title 18, section 1956(a) (1) (B) and one count of attempted money laundering in violation of United States Code Title 18, section 1956 (a) (3) (B).

At trial, the government questioned Schafer about his cooperation agreement with the government and the circumstances surrounding the sting operation. Defense counsel conducted voir dire outside the jury's presence, but Schafer refused to answer on Fifth Amendment grounds any questions concerning whether he delivered cocaine, whether he had transactions with convicted drug dealers, whether he had transactions with convicted drug dealers to file fraudulent documents to defeat state sales tax on automobile purchases, and whether he produced for defense counsel his 1987, 1988 and 1989 tax returns. Over defense objections, the district court allowed Schafer to testify and refused to permit cross examination regarding Schafer's involvement in other federal criminal activity.

The jury acquitted Kaufmann on two money laundering counts and was unable to reach a verdict on the other two money laundering counts. The district court granted a mistrial on those counts, and later dismissed them without prejudice. Kaufmann was convicted on the attempted money laundering count and was sentenced to forty-six months in prison and a $30,000 fine. His sentence was stayed pending appeal to the United States Court of Appeals for the Seventh Circuit. Currently he remains free on bond pending this Court's decision on this petition.

The United States District Court for the Eastern District of Wisconsin had jurisdiction pursuant to United States Code Title 18, section 3231. Kaufmann filed a timely notice of appeal immediately after sentencing on June 3, 1991. Judgment including sentence under the Sentencing Reform Act was entered on June 7, 1991. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to United States Code Title 28, section 1291 and Rule 4(b) of the Federal Rules of Appellate Procedure.

ARGUMENT IN SUPPORT OF WRIT

I. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS DIRECTLY CONFLICTS WITH CLEAR CONGRESSIONAL INTENT THAT MERCHANTS WILL NOT BE LIABLE UNDER THE "STING" MONEY LAUNDERING STATUTE UNLESS LAW ENFORCEMENT AGENTS OR INFORMANTS ACTING AT THEIR DIRECTION REPRESENT THAT THE MONEY INVOLVED IN THE TRANSACTION IS FROM ILLEGAL SOURCES.

In order to obtain a conviction under the basic money laundering statute, United States Code Title 18, section 1956 (a), the government must prove, *inter alia*, that the property, monetary investments or funds (money), involved in the transaction represent the proceeds of some form of unlawful activity. Although section 1956 (c) provides definitions for numerous terms used in the section, "represent" is not one of the terms

defined. The appellate courts have not conclusively defined the term, but have upheld convictions where the evidence showed that the defendant had actual subjective knowledge that the money used in the transaction was derived from illegal activity. *See, e.g., United States* v. *Campbell*, 977 F.2d 854, 851 (4th Cir. 1992). Underlying that interpretation is the statutory requirement that the transaction is one "which *in fact* involves the proceeds of specified unlawful activity . . . ." 18 U.S.C. § 1956 (a) (1) (emphasis added).

The requirement that the money used actually be proceeds of illegal activity presented a problem for government agents attempting to set up "sting" operations to trap unwary business people in both legitimate and illegal businesses. Government agents investigating money laundering activities could not charge an individual with violating section 1956 unless the money used actually was illegally obtained. Since the government's money presumably is not illegally obtained, a person agreeing to launder those funds would not violate section 1956 (a) (1). 134 Cong. Rec. S17,360, S17365-66 (Nov. 10, 1988).

In response to this investigative snag, in 1988 Congress enacted subsection (a) (3) of section 1956. Anti-Drug Abuse Act, P.L. 100-690, § 6465, 102 Stat. 4375 (1988). Dubbed the "sting" section, it was expressly designed to allow government agents to enter into undercover money laundering arrangements by *representing* that the money involved constitutes proceeds of specified unlawful activity. 134 Cong. Rec. at S17,365-66. At issue before this Court is whether government agents must make those representations explicitly, or whether the unambiguous statutory language is violated when the defendant allegedly knew or should have known that the money might be from illegal sources.

The United States Court of Appeals for the Seventh Circuit noted that the statute requires both representations about the nature of the money and the defendant's belief that the money was from illegal activity, but then went on to indicate that the defendant's *belief* about the source of the funds puts the defendant at risk:

> Of course, under this provision, an ordinary person will not know that he is receiving representations from law enforcement officers or an authorized informant. However, the statute provides adequate notice that if he believes the property is the proceeds of specified unlawful activity, he incurs a high risk of liability if he conducts a financial transaction with the intent to conceal its ownership.

United States v. *Kaufmann*, 985 F.2d 884, 896 (7th Cir. 1993) (App. A-20). This language effectively relieves law enforcement officers, or informants acting on their authority, from the statutory obligation to *represent* to the target of the sting operation that illicit funds are being used. Although the defendant's belief is an element of the offense, the representation also is an element and cannot simply be subsumed into the defendant's subjective belief.

On its face, the statutory requirement that the agents represent that the money is from illegal sources is relatively straightforward, although Congress's attempt to define "represent" is a classic circular definition, which uses the term itself to define the term: "For purposes of this paragraph . . . the term 'represented' means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section." 18 U.S.C. § 1956(a)(3).

A "representation" is "any conduct capable of being turned into a statement of fact." *Black's Law Dictionary* 1169 (5th ed. 1979). Unfortunately, neither that definition nor the statutory definition provides much guidance to determine at what point a merchant is involved in criminal conduct. Must the undercover agent specifically state that the money being used to purchase the automobile is drug money? Perhaps the "representation" is made by mere physical or visual characteristics considered typical of someone involved in illegal activity. For example, suppose a young black man dresses in "flashy" clothes, wears heavy jewelry and carries a beeper, a portable telephone and a briefcase, the stereotypical "inner city drug dealer" uniform. Is the money

that person uses to make a purchase "represented" to be the proceeds of illegal activity within the meaning of section 1956(a) (3) (B)? Is the merchant required to compile background information and assume, based upon the buyer's appearance or behavior, that drug money is involved? If so, is the merchant's "assumption," absent a "statement of fact" from the purported purchaser, sufficient to establish a "representation that the purchase money is allegedly the proceeds of illegal activity?" Or is the merchant's assumption sufficient to satisfy the *belief* element, with something more affirmative required to satisfy the *representation* requirement?

In this case, the representations were both vague and contradictory. Schafer, the informant working with the IRS, did not give Kaufmann the cover story he received from the government. Agent Myre, who posed as the Porsche buyer, testified at trial that Schafer was supposed to tell Kaufmann that Myre was in the narcotics business and had narcotics money which he wanted to spend on a classic automobile to be titled in another person's name.

As filtered through Schafer, however, the story was greatly diluted. Schafer's friend became a Minneapolis resident who wanted to title the car in someone else's name because he was going through a divorce and did not want his spouse to discover the purchase. The friend was in Milwaukee for a large real estate transaction. Over the course of numerous conversations between Schafer and Kaufmann concerning the Porsche transaction, Schafer mentioned a drug connection on only one occasion, and then in terms of his friend being a low profile marijuana dealer.

Neither Schafer nor Myre ever directly stated that the money being used was obtained through drug sales or other illicit enterprises. Given the representation that Myre was a low profile marijuana dealer who also was involved in large-scale real estate transactions, the money could well have come from either legitimate or illegitimate sources. All of a person's assets are not automatically tainted if the person sells drugs but also has legitimate sources of income. Only the proceeds of specified illegal

activity fall within the scope of section 1956; proceeds from legal activity do not, regardless of the person's other sources of income. Since Kaufmann was told that Myre had legitimate sources of income and reasons for concealment, the government cannot rest on the single reference to being a low profile marijuana dealer as sufficient representation that the money was from unlawful sources.

Without a requirement of more specific references to the money being from illegal sources in sting operations, the term "represents" is far too vague to provide fair notice of what conduct will violate the statute and adequately guard against arbitrary and discriminatory enforcement. *Kolender* v. *Lawson,* 461 U.S. 352, 357 (1983). The Seventh Circuit's decision below effectively relieves the government from making the specific representations required by the statute and intended by Congress, as long as the defendant believes, for whatever reason, that proceeds of illegal activity are involved.

In contrast to law enforcement investigations of crimes that have already occurred, sting operations are uniquely amenable to government control. Government agents decide who to target for which crimes, what procedures will be used, who will play what roles, and what information will be given to which parties to the proceedings. Section 1956(a) (3) was enacted to facilitate sting operations, but it cannot be construed to give the government unfettered power to arrange a crime scenario without providing necessary information to the most crucial player in the scene.

Sting operations can operate successfully with more explicit "representations" as to the source of the money to be used in the transaction. For example, in *United States* v. *Loehr,* 966 F.2d 201 (6th Cir. 1992), the informants specifically told the defendant that drug money would be used to purchase a vehicle, that it would be a $20,000 cash transaction in a fictitious name, and that an IRS Form 8300 could not be filed. That is but one of many examples in the reported decisions of the kind of specific representations required by section 1956(a) (3).

Congress did not authorize the government to prosecute under section 1956(a) (3) when *either* the necessary representations are made *or* the defendant holds the subjective belief that the money used for the transaction is from illegal sources. Both the representations and the belief are elements of the offense. If allowed to stand, the Seventh Circuit's interpretation opens the door to eliminating the representation element any time the evidence indicates that the defendant knew or should have known that illicit funds were involved, regardless of the source of that information.

II. KAUFMANN'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY THE LIMITATIONS IMPOSED ON HIS CROSS EXAMINATION OF A GOVERNMENT INFORMANT AS TO THE INFORMANT'S MOTIVE AND BIAS.

During trial, defense counsel attempted to cross examine Schafer, the government's key witness against Kaufmann, regarding his motive and bias. The district court allowed defense counsel to conduct a voir dire examination of Schafer outside the jury's presence. During that examination, Schafer refused to answer a variety of questions, including whether he delivered cocaine, whether he had any transactions with convicted drug dealers, whether he entered into transactions with convicted drug dealers to file fraudulent documents to defeat state sales tax on automobile purchases, and whether he produced for defense counsel his 1987, 1988 and 1989 tax returns.

In reviewing this issue, the district court stated, "it isn't too often you come along with problems that are as close a call as I find this to be." The court nevertheless allowed Schafer to testify despite his voir dire responses. The court also limited cross examination on Schafer's motive and bias to a letter and waiver agreement prepared by the government referring to the possibility of counterfeiting charges against him. By allowing Schafer to testify on direct examination and by severely limiting Kaufmann's ability to confront and cross examine Schafer, the court denied Kaufmann's constitutional rights.

Kaufmann's right to confront and cross examine Schafer is guaranteed by the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. If an accused's Sixth Amendment right conflicts with a witness's Fifth Amendment right against self-incrimination, "the courts must watch vigilantly to ensure that the invocation [does] not " 'effectively . . . emasculate the right of cross examination itself.' " [*Delaware* v. *Fensterer*, 474 U.S. 15, 19 (1985)] (quoting *Smith* v. *Illinois*, 390 U.S. 129, 131 . . . (1968))." *United States* v. *Zapata*, 871 F.2d 616, 623 (7th Cir. 1989). Striking the direct testimony of a nonresponding witness may be necessary to prevent the emasculation of the Confrontation Clause. *Id.*

The question here is whether the district court emasculated the confrontation clause by refusing to strike all or part of Schafer's testimony. Resolution of this issue should focus on whether the unanswered questions related directly to the scope of the direct examination or to "collateral matters." *Zapata*, 871 F.2d at 624. While some courts consider the "general credibility" of a witness a collateral matter, *id.* at 624; *United States* v. *Humphrey*, 696 F.2d 72, 75 (8th Cir. 1982), *cert. denied*, 459 U.S. 1222 (1983), a witness's motive or bias specifically has been determined not to be collateral. *United States* v. *Anderson*, 881 F.2d 1128, 1139 (D.C. Cir. 1989). In *Anderson*, the trial court denied defense counsel the opportunity to cross examine the government's star witness about a murder indictment against him which was dismissed without prejudice prior to trial. Rejecting the government's argument that cross examination regarding the dismissed charges and a possible cooperation agreement was unrelated to any trial issue, the court held that "[b]ias is never classified as a collateral matter which lies beyond the scope of inquiry [on cross examination] nor as a matter on which an examiner is required to take a witness' answer." *Anderson*, 881 F.2d at 1139 (citations omitted).

The government conceded the *Anderson* court's holding that matters of bias or motive are not collateral, but portrayed

Anderson as an aberrant case distinguishable on its facts. *Anderson*, however, is firmly based on the United States Supreme Court's holdings in *Delaware* v. *Van Arsdall*, 474 U.S. 6733 (1983) (confrontation clause violation exists where defendant shows that cross examination of "prototypical form of bias" by witness is denied) and *Davis* v. *Alaska*, 415 U.S. 308 (1974) (jurors entitled to benefit of defense theory regarding prosecution witness's bias).

The questions Schafer refused to answer regarding his other criminal activities were not intended to attack his general credibility. Instead, they were designed to elicit his motive or bias to testify favorably for the government. Cross examination serves two distinct purposes: to impeach the general credibility of a witness and to expose "possible biases, prejudices or ulterior motives of the witness . . . ." *Davis*, 415 U.S. at 316 (quoting 3A J. Wigmore, *Evidence* § 940, at 775 (Chadbourne rev. ed. 1970)), *quoted in Anderson*, 881 F.2d at 1136. Partiality, bias or motive is "always relevant." *Id.*

The government knew that Schafer's criminal activity extended beyond the potential counterfeiting charges, discussed in a letter and waiver agreement the government sent to Schafer's attorney, to international counterfeiting activity, cocaine transactions and transactions with convicted drug dealers to avoid state sales tax liability on automobile purchases. More significantly, *Schafer* knew that the government knew of his illegal activities; his attorney specifically advised the government that Schafer would invoke his right against self-incrimination if questioned about various allegations of criminal activity. While the letter from the government and the waiver agreement referred only to the counterfeiting charges, the documents were not a formal plea agreement. Unlike the government's formally written plea agreements with other persons who testified against Kaufmann, which were executed even prior to Kaufmann's indictment, the Schafer "agreement" was informal, unspecific, unexecuted and negotiated just before trial.

Schafer had a motive and bias to cooperate with the government and even to fabricate testimony as to Kaufmann's conduct.

Questioning him regarding that bias and motive to cooperate with the government was not collateral. His refusal to answer those questions on cross examination therefore was directly related to his direct examination and seriously prejudiced Kaufmann's confrontational rights. Schafer's testimony should have been stricken. *See Zapata*, 871 F.2d at 623-24. The district court's refusal to allow cross examination of Schafer regarding that motive and bias, and its refusal to strike Schafer's testimony in light of his invocation of the Fifth Amendment regarding questions directed at his bias and motive, denied Kaufmann's Sixth Amendment right to confront his accusers and his right to due process.

CONCLUSION

For all the foregoing reasons, petitioner Harry C. Kaufmann respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GIMBEL, REILLY, GUERIN & BROWN

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Appendix To Petition For Writ Of Certiorari

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 92-1463

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HARRY C. KAUFMANN,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WISCONSIN.
NO. 90 CR 172—ROBERT W. WARREN, JUDGE.

Submitted August 26, 1992—Decided February 2, 1993
Before CUMMINGS and EASTERBROOK, *Circuit Judges,*
and FAIRCHILD, *Senior Circuit Judge.*

FAIRCHILD, *Senior Circuit Judge.*

Harry C. Kaufmann is the owner of Kaufmann Motorcars, Inc. ("Kaufmann Motors") in Milwaukee, Wisconsin. On September 11, 1990, a grand jury indicted Kaufmann on four counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B), and one count of attempted money laundering in violation of 18 U.S.C. § 1956(a)(3)(B). A jury acquitted Kaufmann on counts one and two, was unable to reach a verdict on counts three and four, and convicted Kaufmann on count five for attempted money laundering. Kaufmann was sentenced on the count of conviction and appealed. Because two counts of the indictment

remained unresolved, we held that the judgment was not final and therefore we lacked appellate jurisdiction. *United States* v. *Kaufmann*, 951 F.2d 793 (7th Cir. 1992). Following dismissal of the appeal, the government moved the district court to dismiss the open counts of the indictment without prejudice, pursuant to Fed. R. Crim.P. 48(a). The district court granted the government's motion and the defendant filed a notice of appeal from the judgment and sentence on count five. At the request of the parties, we first considered whether we would have jurisdiction where two counts of the five count indictment were dismissed without prejudice. We decided that we do have jurisdiction, *United States* v. *Kaufmann*, No. 92-1463 (7th Cir. July 2, 1992) (unpublished order), the substance of which we include in this opinion. The parties then filed supplemental briefs. We affirm.

I.
Factual and Procedural History

Defendant-Appellant Harry C. Kaufmann owns Kaufmann Motors, an automobile dealership in Milwaukee, Wisconsin that specializes in selling luxury and exotic automobiles such as Excalibur, Zimmer, De Lorean and Mercedes Benz. Through his course of dealings in the automobile business, Kaufmann was friendly with a man by the name of Tom Schafer. Schafer was aware that federal authorities might charge him in connection with the passing of counterfeit money. Schafer agreed to cooperate with law enforcement agents with the hope of receiving consideration with regard to the counterfeiting charges. In particular, he agreed to assist the Internal Revenue Service ("IRS") in a "sting" operation directed at Kaufmann by setting up a sale of an automobile to a purported drug dealer. Schafer had a number of conversations with Kaufmann in this regard that were recorded on audiotape. At the trial, Kaufmann and Schafer provided contradictory testimony concerning the number and content of additional unrecorded conversations.

At the IRS agents' instruction, Schafer told Kaufmann about a "friend" of his, Tom Ryder — who, unknown to Kaufmann, was IRS Special Agent Greg Myre. According to the prearranged story, Schafer told Kaufmann that Ryder was a marijuana dealer from Minneapolis who was interested in purchasing a Porsche 911 automobile. Schafer stated that the purchase had to be in cash and the car titled in someone else's name. Kaufmann agreed to sell the Porsche under these terms for $40,000. At a later meeting, Schafer provided a letter to Kaufmann, purportedly written by "Ryder" and addressed to Schafer. The letter provided, in pertinent part:

> If you can set this up, I'll make your time worth while, but here's what I need from your guy. Number one, the whole deal is cash, period. Number two, I want the car titled in a friend's name. Will I need to have him there? Number three, my name must never come out. Number four, your guy's cool about my business? PS, make sure your guy understands that the arrangements are more important than the price.

During this meeting, Kaufmann acknowledged that Schafer's friend was "in an illegitimate business." Schafer commented, "He's just a marijuana dealer. . . . Not high profile. Real low profile." In response, Kaufmann told Schafer that he had supported himself when he was a kid, "dealing coke and crystal." Kaufmann also stated that he was willing to title the car in the name of someone else, and that the titleholder need not be present at the dealership.

In February of 1990, Schafer first brought Myre to the dealership, although Kaufmann was not in the store that day. On March 29, 1990, Myre returned to the dealership, along with IRS Special Agent Rich Ahern, posing as Rick Adams (hereinafter referred to by their true names, "Myre" and "Ahern"). Myre carried a briefcase containing approximately $45,000 to $50,000 in cash. During the course of their conversation, Myre informed Kaufmann that he wished to purchase the Porsche in cash, and directed that title be put in Ahern's name. Kaufmann agreed,

commenting, "[T]hat's between you guys" and later stated, "I really don't even want to know about it." Kaufmann and Myre also discussed the filing of Form 8300, a form required to be filed with the IRS when a transaction involves more than $10,000 in cash.[1] Myre made it clear that he did not want his name to appear on any of the paperwork involved in the transaction. Kaufmann

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1. In particular, the following conversation occurred:

Kaufmann: Um, OK, if I understand what Tom told me, you're the gentleman buying this Porsche?

Ahern: Yeah, we'll put my name on it.

Kaufmann: OK.

Myre: Yeah. I want the car, but I want to put it in his name.

Kaufmann: OK. Well, that's between you guys.

. . .

Kaufmann: OK. I mean, ah, and you're paying for the car in cash or what are we doing?

Myre: Cash is all I got.

Kaufmann: OK. And I explained to Tom that you have to fill out a Currency Transaction Report.

Myre: Yeah, I know that they got this government form that everybody's dealing in now, is that absolutely necessary?

Kaufmann: Absolutely necessary.

Myre: OK.

Kaufmann: They will close me up otherwise. What happens is, then I'm involved what is called conspiracy. A friend of mine just lost a dealership in Florida. ____ to sell a car ____ and I explained that to Tom.

Myre: Well, he said that you had mentioned that you had this form we're going to have to deal with.

Kaufmann: Yes.

Myre: Alright. How can we deal with it then? I don't want my name on anything, if it's possible.

Kaufmann: Well, if you're not buying the car, then your name wouldn't be on anything. His name would be on everything.

. . .

Kaufmann: If it's over $10,000, I mean if I sold your car, which I can't, for 11,400 or sold your car for, you know, 77,000, either way the form has to be filled out.

(footnote continues)

told the agents that he must file the form, but agreed to complete the form in Ahern's name. Myre additionally told Kaufmann that he had brought cash in an assortment of denominations, and Kaufmann responded, "That's most likely what I figured." Agent Ahern did not actively participate in this discussion and Myre retained possession of the briefcase throughout their meeting.

After the terms were agreed upon, Kaufmann began to prepare the sales forms. However, before the transaction could

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(footnote continued)

Myre: So even though it's my cash, he can put his name on the form, right?

Kaufmann: I'm not an attorney. As far as I'm concerned, he's buying that car.

Myre: OK, that's fine.

Kaufmann: I mean, I don't know. Tom told me that he was buying the car, so I don't know, that's between you two guys.

Myre: As long as my name isn't associated with it, it's great.

Kaufmann: You're not buying the car, sir, then your name wouldn't need to be associated with anything.

Myre: Right.

. . .

Kaufmann: . . . all I can't do and I have no interest in doing, is getting involved in any commotion, but if he is purchasing the vehicle, if he is paying me for the vehicle, that's fine.

Myre: OK.

. . .

Myre: I'll make it worth your while, buddy. See, basically all I'm going to do here, he's going to have the car, we want it titled to him.

Kaufmann: I really don't even want to know about it.

Myre: OK, that's fine. Cuz it's . . .

. . .

Ahern: How do you know, on this, how do you know if I'm going to give you the right information on it?

Kaufmann: Cuz I need identification, sir?

Ahern: OK.

Kaufmann: Yeah, I have to have identification.

Ahern: _____ no big problem.

. . .

be completed, IRS agents entered the office, identified themselves, and purported to "arrest" Myre. Kaufmann was unaware at this time that Myre and Ahern were agents. He told the arresting agents that Myre was in the process of buying an automobile and that he had just begun to fill out the currency report. An arresting agent asked Kaufmann whether it was Myre or Ahern who had brought the money, and Kaufmann responded, "To be honest with you, I can't tell you." This was the last contact Kaufmann had with the agents.

On March 31, 1990—two days after the meeting with Myre and Ahern—Kaufmann asked to meet with Schafer at John Hawk's Pub. This meeting lasted approximately two hours and was also recorded. During this conversation, Kaufmann told Schafer that he was worried that he was in legal trouble, and stated, "I would take a personal vendetta against somebody that got me involved and I've got enough money to cause a guy some hardship."

At trial, the audiotape of the conversations was played for the jury. As well, Schafer and Myre testified in some detail about the "sting" operation. Kaufmann also testified at trial, although his testimony differed in many respects. According to Kaufmann, Schafer had told him that his friend was coming to Milwaukee to buy and sell real estate. Schafer told him that this friend wanted to purchase a Porsche with cash and title the car in another's name so that his wife—whom he was divorcing—would not know he had purchased a car.

On September 11, 1990, a grand jury indicted Kaufmann on four counts of money laundering in violation of 18 U.S.C.

§ 1956(a)(1)(B)[2] and one count of attempted money laundering in violation of 18 U.S.C. § 1956(a)(3)(B). Count five, the only count before us, alleged that Kaufmann attempted to conduct a financial transaction involving property represented by law enforcement officers to be the proceeds of specified unlawful activity, with the intent to conceal and disguise the nature, location, source, ownership, or control of the property believed to be the proceeds of specified unlawful activity. The financial transaction attempted was the sale of a Porsche automobile to an undercover agent of the Criminal Investigation Division of the IRS. The completion of the sale was frustrated by the "arrest."

The jury returned a verdict of not guilty on counts one and two and a verdict of guilty on count five. The jury was unable to reach a verdict on counts three and four, and Judge Warren granted a mistrial as to these counts. Kaufmann was sentenced to 46 months in prison with a $30,000 fine on count five. This sentence was based, in part, on a two level enhancement for obstruction of justice. Judge Warren based the enhancement on three findings of obstruction of justice that had been recommended in the Pre-Sentence Investigation Report ("PSI"). First, he found that Kaufmann had threatened Schafer; second, that Kaufmann had provided false testimony; and third, that Kaufmann had made a false statement to law enforcement officers

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[2] To obtain a conviction for money laundering under 18 U.S.C. § 1956(a)(1)(B), the government must prove that a defendant: (1) knowingly conducted a financial transaction; (2) which he knew involved funds derived from criminal activity and which in fact involved the proceeds of drug distribution; (3) with knowledge that the transaction was designed to disguise the nature or source of the proceeds. See *United States* v. *Jackson*, 935 F.2d 832, 838-39 (7th Cir. 1991); *United States* v. *Brown*, 944 F.2d 1377, 1387 (7th Cir. 1991).

In counts one through four, Kaufmann was alleged to have conducted automobile sales involving the proceeds of drug trafficking, knowing that the money involved was the proceeds of unlawful activity and that the transactions were designed to conceal the nature and source of those proceeds. Counts one and two involved sales to Jerome Mann and Billy Cannon, respectively. Counts three and four involved two sales to James Verser.

when they "arrested" Myre. Judge Warren stayed the execution of the sentence pending appeal. Kaufmann appealed.

We initially held on appeal that the judgment was not final because two counts of the indictment remained unresolved, and we therefore did not have appellate jurisdiction. *Kaufmann*, 951 F.2d 793. Following dismissal of the appeal, the government moved the district court to dismiss the open counts of the indictment without prejudice, pursuant to Fed. R. Crim. P. 48(a). The district court granted the government's motion and the defendant filed a notice of appeal from the judgment and sentence on count five. In an unpublished order, we held that the dismissal without prejudice of the unresolved counts, where there was no evidence that the parties or district judge were attempting to deliberately circumvent the rules of procedure to "create" appellate jurisdiction, rendered the judgment final and appealable. *Kaufmann*, No. 92-1463, slip op. at 10 (7th Cir. July 2, 1992) (unpublished order). We concluded that we had jurisdiction to hear the appeal.

Kaufmann raises a number of contentions regarding the propriety of his conviction and sentence under count five.

II.
Discussion

A. Jurisdiction

On an earlier date, we dismissed the defendant's appeal for lack of appellate jurisdiction. Following dismissal of the appeal, the government moved the district court to dismiss the open counts of the indictment without prejudice, pursuant to Fed. R. Crim. P. 48(a). The district court granted the government's motion and defendant filed a notice of appeal from the judgment and sentence on count five. The government has called our attention to our recent decision in *Horwitz* v. *Alloy Automotive Co.*, 957 F.2d 1431 (7th Cir. 1992), perhaps suggesting we consider whether a dismissal without prejudice might prevent finality.

The dismissal of the two counts without prejudice does not bar a new indictment. Does that mean the judgment on the count of conviction is not yet final? We have found no decision in a criminal case so holding. Rule 48(a) provides that, upon dismissal of an indictment by the United States Attorney, "the prosecution shall thereupon terminate."

Any analogy to a civil case in this respect is imperfect. A new civil action can be commenced at the will of the plaintiff. In a criminal case involving charges similar to those in this case, the government must secure an indictment. Leaving that fact aside, we have found no decision in a civil case that a judgment on the merits of one or more claims is not final if all other claims in the complaint have been dismissed without prejudice. To the contrary, the Eighth Circuit in *Chrysler Motors Corp.* v. *Thomas Auto Co.*, 939 F.2d 538, 540 (8th Cir. 1991) has held that dismissal without prejudice of claims not decided on the merits renders a partial summary judgment on the other claims a final judgment for purposes of appeal.

Horwitz did not announce a principle that dismissal of some claims without prejudice deprives a judgment on the merits of all other claims of finality for purposes of appeal. Rather, the court concentrated on the intent of the district court and the parties to bypass the rules.

The civil action in *Horwitz* was based upon a complaint including seven counts. The district court granted a partial summary judgment for the defendants and dismissed four of the counts based on the doctrine of *res judicata*. The plaintiff sought to bring an immediate appeal on the dismissal of the four counts. The parties and the district judge, voicing his belief that this court would not accept an interlocutory appeal via 28 U.S.C. § 1292(b), nor accept finality via Rule 54(b), devised a plan to create a final appealable order. The district judge and the parties agreed to dismiss both the plaintiff's remaining counts and the defendant's counterclaim without prejudice to refiling. *Id.* at 1432-33. The parties and the district judge simply endeavored to get an interlocutory appeal on the four previously dismissed

counts by "creating" a final order; they did not contemplate that the voluntary dismissal without prejudice would terminate the litigation. *Id.* at 1435. On appeal, this court found that, indeed, the unconditional reinstatement was contemplated by the parties. *Id.* at 1436. We held that the judgment so created was not final and, therefore, not appealable.

The parties in this case entered an agreement in which the government stated that it would dismiss counts three and four without prejudice and the defendant stated that he would file a notice of appeal on the count of conviction. There is no evidence here that the parties and the district judge were attempting deliberately to circumvent the rules of procedure to "create" appellate jurisdiction. Although the government is free to seek a new indictment on the dismissed counts, there is nothing to indicate its intention to do so.

In our prior opinion dismissing the appeal in this case, we stated, "If counts three and four are dismissed upon the government's motion, and if the defendant again files a notice of appeal, then in the interest of judicial economy the same panel will decide the appeal on the same briefs, without further oral argument." *Kaufmann*, 951 F.2d at 796. The government argues that this statement indicates that the jurisdictional issue had been decided on the prior appeal. In our earlier opinion, we did not specify that the dismissal must be with prejudice in order to make the judgment final and, thus, may have implied that a dismissal without prejudice could make the judgment final and appealable. While our statement is arguably law of the case, which "encompasses a court's explicit decisions, as well as those issues decided by necessary implication," *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987), here it was intended merely as a vehicle to expedite any immediate subsequent appeal due to a dismissal and did not necessarily imply that we had considered the issue of whether dismissal without prejudice would prevent finality. However, because the government's action in dismissing the remaining counts was in response to our suggestion, it can be distinguished

from the *Horwitz* parties' attempt to bypass, rather than follow, the rules.

Finally, our prior decision dismissing the appeal for lack of jurisdiction followed *United States* v. *Kalinowski*, 890 F.2d 878 (7th Cir. 1989) and *United States* v. *Patel*, 835 F.2d 708 (7th Cir. 1987). So far as we are aware, neither of these decisions has been followed by our sister circuits. In fact, several circuits have, without addressing the question of appellate jurisdiction, entertained an appeal on one count of a criminal indictment while other counts of the indictment were unresolved. *See United States* v. *Cicco*, 938 F.2d 441, 442 n.1 (3d Cir. 1991); *United States* v. *Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 22 (1st Cir. 1989); and *United States* v. *Richardson*, 817 F.2d 886, 887 (D.C. Cir. 1987). In light of the apparent novelty of our approach to the matter of finality in this area in criminal cases, we decline to extend it any further.

B. Sufficiency of the Evidence

Kaufmann was convicted on count five for violating 18 U.S.C. § 1956(a)(3)(B), which defines an offense:

> Whoever with the intent to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity . . . conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity. . . .

The statute further defines the term "represented" as "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal

official authorized to investigate or prosecute violations of this section." 18 U.S.C. § 1956(a)(3).[3]

Kaufmann asserts that the evidence is insufficient to support his conviction. In challenging the sufficiency of the evidence, Kaufmann bears a heavy burden. *United States* v. *Anagnostou*, 974 F.2d 939, 943 (7th Cir. 1992) (citing *United States* v. *Davis*, 890 F.2d 1373, 1377 (7th Cir. 1989), *cert. denied*, 493 U.S. 1092 (1990)). The court will uphold the conviction if the evidence, viewed in the light most favorable to the government, establishes that any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); *Anagnostou*, 974 F.2d at 943. On appeal, we do not reweigh the evidence or assess the credibility of witnesses. *Id.*

The critical issues Kaufmann raises on appeal are whether there was evidence: (1) that the undercover agents and Schafer, an informant acting at the direction or with the approval of a federal law enforcement officer, had "represented" the cash to be the proceeds of marijuana dealings; (2) that Kaufmann in fact believed the cash was drug proceeds; and (3) that Kaufmann intended to conceal or disguise the nature, source, or ownership of the property believed to be the proceeds of specified unlawful activity. Reviewing the evidence in the light most favorable to the government, as we must on appeal, we are not persuaded by Kaufmann's claims that the evidence was insufficient.

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[3] Section 1956 defines the term "transaction" to include "a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition . . . " 18 U.S.C. § 1956(c)(3). A "financial transaction", as defined by the statute, means "(A) a transaction (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce . . . " 18 U.S.C. § 1956(c)(4). In this case, the transaction involved the sale of a Porsche automobile. This transaction fit within the definition of "financial transaction" because it involved cash and because the sale would have some effect on interstate or foreign commerce.

First, we address whether the agents represented that the cash was proceeds of marijuana dealings. Relevant to this inquiry is whether the language Congress used — "represented . . . to be the proceeds of specified unlawful activity" — should be construed to require an express statement by the agents or Schafer or whether a conviction can be sustained where there are statements and conduct from which a reasonable person would infer that the money was drug proceeds. A representation is "[a]ny conduct capable of being turned into a statement of fact." BLACK'S LAW DICTIONARY 1301 (6th ed. 1990) (citing *Scandrett* v. *Greenhouse*, 244 Wis. 108, 11 N.W.2d 510 (1943). A representation, therefore, encompasses a broader range of communication than specific statements. We do not believe that Congress intended for the term "representation" to be narrowly read as requiring an express statement by government agents. Such a reading of § 1956(a) surely would place an unreasonable burden on a government agent's ability to enforce the statute:

> To hold that a government agent must recite the alleged illegal source of [the] . . . property at the time he attempts to transfer it in a "sting" operation would make enforcement of the statute extremely and unnecessarily difficult; "legitimate criminals," whom undercover agents must imitate, undoubtedly would not make such recitations before each transaction.

United States v. *Arditti*, 955 F.2d 331, 339 (5th Cir.), *cert. denied*, ___ U.S. ___ 1992 U.S. Lexis 7463 (1992). It is enough that the government prove that an enforcement officer or authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds.

In this case, there is no evidence of an express statement to Kaufmann that the cash to be used in purchasing the Porsche was the proceeds of marijuana sales. To the contrary, Schafer and the agents testified that they never specifically told Kaufmann that the money came from drug proceeds. There were, however, statements of various facts from which a reasonable person

would almost certainly infer that drug proceeds were involved. The evidence demonstrates that Schafer told Kaufmann that the man interested in purchasing the $40,000 Porsche had to pay cash and that he wanted the car titled in a name other than his own. Schafer also told Kaufmann that this man was a marijuana dealer. To buttress these statements, Schafer supplied a letter to Kaufmann, purported to be from the interested buyer. In this letter, Myre stated that the purchase in cash and the titling in another's name were more important considerations than the price. The letter states, in pertinent part:

> If you can set this up, I'll make your time worth while, but here's what I need from your guy. Number one, the whole deal is cash, period. Number two, I want the car titled in a friend's name. Will I need to have him there? Number three, my name must never come out. Number four, your guy's cool about my business? PS, make sure your guy understands that the arrangements are more important than the price.

At a subsequent date, Myre, posing as the purchaser, arrived at the dealership with a briefcase containing cash in an assortment of denominations. Myre directed that title be put in the name of Ahern and made it clear that he did not want his name to appear on any of the paperwork involved in the transaction. There is no indication that Myre was making a gift to Ahern or that Ahern would actually possess the automobile. While there is no evidence that Schafer or the agents made an explicit statement to Kaufmann that "this money comes from drug sales," the evidence, taken as a whole, sufficiently demonstrates that Schafer's and the agents' assertions gave Kaufmann or any reasonable person in his position a firm basis to believe that the money derived from drug sales. We think there was sufficient evidence for the jury to find that there had been a "representation" to that effect.

Kaufmann asserts that the evidence is insufficient to establish that he believed the money was drug proceeds. Kaufmann testified that Schafer told him that his "friend", Tom Ryder, was

coming into town to look at some real estate; that Ryder was going through a divorce and for that reason did not want the automobile titled in his name; and that he was merely a "low profile" marijuana dealer. Kaufmann also testified that the informant's reference to marijuana did not mean much to him, especially since the informant tended to exaggerate. Coupled with the lack of an express statement from either Schafer or the agents, Kaufmann contends that he simply had no reason to believe that the money with which Myre was purchasing the car was drug proceeds.

At trial, however, Schafer testified that he did not believe he told Kaufmann of any family problems, and that he had no recollection of making assertions regarding Ryder's real estate dealings or divorce. Although there is some support in the record for Kaufmann's contentions,[4] the jury apparently did not find Kaufmann's testimony credible. Credibility determinations are given great weight and will not be disturbed on appeal. *United States* v. *Brown*, 944 F.2d 1377, 1379 (7th Cir. 1991); *United States* v. *Beal*, 960 F.2d 629, 634 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 230 (1992). We believe there was sufficient evidence from which the jury could find not only a representation by Schafer and Myre that the money was drug proceeds, but also that Kaufmann believed it.

Kaufmann also contends that there is insufficient evidence that he intended to conceal or disguise the source of the proceeds. Kaufmann asserts that he repeatedly told Myre that he would file a Form 8300, that he would require identification from the titleholder, and that he did not wish to jeopardize his dealership by not properly completing and filing the Form 8300. While Kaufmann's recollection of the events is consistent with the taped conversations, we still conclude there was evidence from which the jury could find that Kaufmann intended to "conceal"

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[4] During a meeting with Schafer, Kaufmann stated that he believed Myre was getting a divorce. Moreover, during the "sale," Kaufmann asked Myre whether he was married or single, and Myre responded that he was divorced.

the source of the proceeds. First, Kaufmann agreed to title the Porsche in Ahern's name. This in itself is not illegal, and there can be legitimate reasons for doing so. *See United States* v. *Antzoulatos*, 962 F.2d 720, 727 n.4 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 331 (1992). The circumstances here, however, demonstrate that Kaufmann was aware of the purchaser's motivation for titling the car in another's name — circumstances which cried out "concealment" — "my name must never come out;" payment in cash; anonymity; Kaufmann's need to be "cool" about Myre's business, and that these considerations were more important than the price. In aid of Myre's anonymity, Kaufmann was willing to complete the Form 8300 Report of Cash Payments Over $10,000 showing Ahern as the "Individual or Organization for Whom this Transaction was Completed." Even under Kaufmann's suggestion that titling in Ahern's name was requested because of Myre's pending divorce, the purpose was concealment of the asset, albeit from Myre's wife. The jury could scarcely find otherwise than an intent to conceal Myre's ownership of the funds and car.

Relying upon *United States* v. *Sanders*, 929 F.2d 1466 (10th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 143 (1991) and *United States* v. *Campbell*, 777 F. Supp. 1259, 1264 (W.D.N.C. 1991), *aff'd in part and rev'd in part*, 977 F.2d 854 (4th Cir. 1992), Kaufmann argues that placing title of a car in the name of someone other than the purchaser cannot prove an intent to conceal under § 1956(a)(3)(B). However, in both *Sanders* and *Campbell*, the courts addressed whether the defendant knew that the transaction was designed to conceal the source of the unlawful proceeds under § 1956(a)(1)(B), and not the issue Kaufmann raises on appeal — whether the defendant intended to conceal the source or ownership of the drug proceeds. In any event, the cases are readily distinguished on their facts.

In *Sanders*, the court of appeals held that the titling of an automobile in a family member's name was insufficient evidence of a design to conceal where other actions of the purchaser served to identify the relationship between the true buyer, the

property and the cash. *Sanders*, 929 F.2d at 1472-73. In our case, however, there is nothing to suggest a familial relationship between Myre and Ahern; nor is there evidence indicating any relationship between Myre and Ahern that would serve to identify the connection between Myre, the Porsche and the cash. In *Campbell*, the district court held that, as a matter of law, there was insufficient evidence of defendant's knowledge of a design to conceal where the purchaser appeared at every meeting, where he personally brought the alleged drug money, and where he placed title to the purchased real estate in his parents' name. However, during the pendency of this appeal, the Fourth Circuit reversed in part the district court's judgment.[5] *Campbell*, 977 F.2d 854. In reversing, the court found it unnecessary to determine whether the purchaser had concealed the ownership of the funds by placing title to the real estate in the name of his parents. *Id.* at 858 n.4. As such, *Campbell* offers no guidance on this point.

"We must affirm unless the record is barren of any evidence, regardless of weight, from which the trier of fact could find guilt beyond a reasonable doubt." *Brown*, 944 F.2d at 1388 (quoting *United States* v. *Jackson*, 935 F.2d 832, 840 (7th Cir. 1991) (citations omitted)). Kaufmann has not met this burden. Here, there was sufficient evidence that Myre and Schafer "represented" that the money was proceeds from drug transactions, that Kaufmann believed this to be so, and that Kaufmann intended to conceal the source and ownership of the property. A rational jury could have found Kaufmann guilty of an attempt to violate 18 U.S.C. § 1956(a)(3)(B).

Kaufmann raises a number of other contentions regarding the propriety of his conviction and sentence.

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[5] In *Campbell*, the Court of Appeals held that evidence that the defendant, a real estate agent, knew that her client drove new automobiles and flashed large amounts of cash, stated that his money "might have been drug money" and participated in a real estate transaction in which the client failed to disclose a large cash downpayment was sufficient to create a jury question as to whether the defendant knew of (or was willfully blind to) the illegal source of the money and knew that the purpose of the transaction was to conceal illegal proceeds. *Id.* at 858-59.

C. Constitutionality of Section 1956(a)(3)(B)

Kaufmann attacks the constitutionality of 18 U.S.C. § 1956(a)(3)(B), contending that the statute is both overbroad and void for vagueness.

1. Overbreadth Challenge

A facial challenge to the breadth of a statute may be brought when First Amendment rights are at stake. Kaufmann contends that his first amendment rights to freedom of association and freedom of expression are at stake here. In response, the Government argues that the interest Kaufmann seeks to protect is merely the ability to conduct a business transaction.

There are two lines of cases where a possible impairment of the right to freedom of association is considered: (1) where certain intimate human relationships or a fundamental element of personal liberty are at stake; or (2) where the right to associate for the purpose of engaging in activities protected by the first amendment are involved — *i.e.*, speech, assembly, petition for redress of grievances, or religion. *See Roberts* v. *United States Jaycees*, 468 U.S. 609, 617-18 (1984). Here, the statute does not impair an intimate human relationship nor an association for the purpose of engaging in an activity protected by the first amendment. Moreover, even if the statute posed some barrier to freedom of association (which it does not), it is clear that it does not impose a "substantial interference," as is required to strike a statute on overbreadth grounds.

Kaufmann also contends that the statute infringes upon his freedom of expression. The speech at issue here is commercial in nature. Commercial speech is not open to an overbreadth analysis. *Record Head Corp.* v. *Sachen*, 672 F.2d 674 (7th Cir. 1982); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 380-381 (1977); *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (Brennan, *J.*, joined by Marshall, Blackmun, and Kennedy, *JJ.*); *but see San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 536-37 n.15 (1987) (doctrine as applied to commercial speech is "highly questionable"). Because § 1956

does not implicate constitutionally protected conduct, Kaufmann's overbreadth challenge fails. *See United States* v. *Gleave*, 786 F. Supp. 258, 267-68 (W.D.N.Y. 1992) (§ 1956 not unconstitutionally overbroad); *United States* v. *Mainieri*, 691 F. Supp. 1394, 1397 (S.D. Fla. 1988) (§ 1956 does not implicate constitutionally protected conduct).

2. Vagueness Challenge

Kaufmann challenges § 1956(a)(3)(B) on vagueness grounds. The void-for-vagueness doctrine requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). The most important aspect of the doctrine is the requirement that the legislature establish minimal guidelines to govern the discretion of law enforcement officials. *Id.* at 358. The vagueness of statutes that do not threaten First Amendment interests is examined in light of the facts at hand. *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988).

We initially note that this court and others have ruled that § 1956(a)(1)(B) is not void for vagueness, both on its face and as applied to facts similar to those at hand. *See Antzoulatos*, 962 F.2d 720; *Jackson*, 935 F.2d 832; *United States* v. *Long*, 1992 U.S. App. Lexis 26643, *26 (8th Cir. 1992); *United States* v. *Gilliam*, 975 F.2d 1050, 1056-57 (4th Cir. 1992); *United States* v. *Awan*, 966 F.2d 1415, 1424-25 (11th Cir. 1992); *Gleave*, 786 F. Supp. at 268-70; *United States* v. *Sierra-Garcia*, 760 F. Supp. 252, 258-59 (E.D.N.Y. 1991); *United States* v. *Kimball*, 711 F. Supp. 1031, 1034 (D. Nev. 1989); *United States* v. *Ortiz*, 738 F. Supp. 1394 (S.D. Fla. 1990).

An examination of § 1956(a)(3)(B) reveals that this provision is unambiguous as well. Under this provision, the government must prove that Kaufmann had the specific intent to conceal or disguise the nature, location, source, ownership, or control of property he believed to be the proceeds of unlawful

activity; that representations to that effect were made by law enforcement officers, or by those acting under their direction; and that the representations relate to specified unlawful conduct enumerated in § 1956 (c)(7). Of course, under this provision, an ordinary person will not know that he is receiving representations from law enforcement officers or an authorized informant. However, the statute provides adequate notice that if he believes the property is the proceeds of specified unlawful activity, he incurs a high risk of liability if he conducts a financial transaction with the intent to conceal its ownership. This provision is not written in a manner that would encourage arbitrary and discriminatory enforcement, *see Kolender*, 461 U.S. at 357, nor would an ordinary person be unable to understand what conduct is prohibited. As such, we conclude that § 1956(a)(3)(B) is not void for vagueness. See *United States* v. *Loehr*, 966 F.2d 201, 203-04 (6th Cir.), *cert. denied*, ___ U.S. ___, 1992 U.S. Lexis 7705 (1992) (§1956(a)(3)(B) not void for vagueness).

D. Ostrich Instruction

Kaufmann challenges the district court's use of what is commonly known as an "ostrich instruction." The district court read the following instruction to the jury:

> You may infer knowledge from a combination of suspicions, and indifference to the truth. If you find that a person had a strong suspicion that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly. . . .

This instruction related directly to the other counts on trial, where knowledge was an element of the offense. Kaufmann claims error because the jury was not told that this instruction did not apply to count five and because the jury received no instruction defining the term "belief". Due to this lack of clarity in instructions, Kaufmann urges, the jury was likely to have relied on the definition of "knowledge" when it found Kaufmann

to have believed that the cash was proceeds of an unlawful activity.

We presume that juries abide by the court's instructions. *See United States* v. *Bell*, No. 91-3271, slip op. at 5 (7th Cir. Nov. 25, 1992); *United States* v. *McKinney*, 954 F.2d 471, 478 (7th Cir.), *cert. denied*, ___ U.S. ___, 1992 U.S. Lexis 7740 (1992). The court clearly instructed the jury that it must find that Kaufmann believed the cash to be proceeds of an unlawful activity in order to convict under count five. Nothing in the instructions gave the jury the impression that "knowledge" was an element under count five and, furthermore, there is no indication that the jury found "belief" under count five only by finding strong suspicion plus indifference.[6]

E. Sixth Amendment Right to Confrontation

Kaufmann contends that the district court denied him the right to effective cross-examination by permitting Schafer to testify and by limiting Kaufmann's ability to cross-examine Schafer concerning his alleged criminal conduct. Kaufmann contends that under *United States* v. *Anderson*, 881 F.2d 1128 (D.C. Cir. 1989), evidence of Schafer's criminal conduct was admissible as evidence of his motive and bias. In *Anderson*, the defendant sought to cross-examine a witness regarding a murder charge that had been dismissed without prejudice. Because there was no evidence of an actual cooperation agreement between the witness and the prosecution, the district court refused to permit the

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[6] In any light, the ostrich instruction was appropriate for counts one through four. This circuit has consistently upheld the use of an ostrich instruction, recognizing that wilful blindness or conscious avoidance is the legal equivalent to knowledge. *Anzoulatos*, 962 F.2d at 724-25 (upheld as applied to 18 U.S.C. § 1956(a)(1)(B)); *see also United States* v. *Ramsey*, 785 F.2d 184, 189-90 (7th Cir.), *cert. denied*, 476 U.S. 1186 (1986); *United States* v. *Valencia*, 907 F.2d 671, 679 (7th Cir. 1990); see also *United States* v. *Breque*, 964 F.2d 381, 387-88 (5th Cir. 1992), *petition for cert. filed* (Oct. 26, 1992) (no error in giving deliberate ignorance instruction in relation to § 1956(a)(3)). In fact, the court in *Ramsey* recommended the use of an instruction identical to the one used here. *Ramsey*, 785 F.2d at 190.

cross-examination. The appellate court reversed. The court reasoned, "[e]vidence that a prosecution witness is subject to reindictment by the prosecution is, by itself, probative of potential bias and is therefore a proper subject of cross-examination under the Confrontation Clause." *Id.* at 1139. Because the dismissed charge "hung over the witness' head like the sword of Damocles," the court concluded that defense counsel should have been permitted to cross-examine the witness. *Id.*

During the trial, the district judge conducted voir dire outside the presence of the jury. When counsel for Kaufmann questioned Schafer regarding his past criminal conduct, Schafer invoked his fifth amendment right against self-incrimination. In particular, Schafer would not respond to questions concerning whether he had engaged in the delivery of cocaine, whether he had engaged in transactions involving the preparation of the false and fraudulent documents to defeat a purchaser's state sales tax obligation on an automobile purchase, and whether he had produced his 1987, 1988 and 1989 tax returns for defense counsel.

In anticipation of the testimony Schafer would give at trial, Kaufmann moved to strike his testimony. The district judge denied the motion and allowed Schafer to testify before the jury. The judge also limited cross-examination of Schafer's motive and bias to documents referring to the potential counterfeiting charges against him. In particular, the district judge found that the admission of two letters concerning the charges would be sufficient to inform the jury of any possible bias. As to the other allegations of criminal conduct Kaufmann sought to use on cross-examination, the judge found they were collateral in nature and that impeachment on those charges was not central to Schafer's credibility.

Whether a defendant has the ability to effectively cross-examine a witness turns on "whether the jury has sufficient information to make a discriminating appraisal of a witness' motive and bias." *United States* v. *Williams,* 858 F.2d 1218, 1223 (7th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989) (quoting *United States* v.

Rodgers, 755 F.2d 533, 548 (7th Cir.), *cert. denied*, 473 U.S. 907 (1985)). The district court is given wide latitude insofar as the confrontation clause is concerned to impose reasonable limits on cross-examination based on other concerns, such as prejudice to the defendant, or when the questioning would be marginally relevant. *See Williams*, 858 F.2d at 1223; *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1985). "When a witness refuses to answer questions based on fifth amendment privilege, striking the witness' entire testimony is an extreme sanction." *United States* v. *Lord*, 711 F.2d 887, 892 (9th Cir. 1983), *quoted in United States* v. *Zapata*, 871 F.2d 616, 624 (7th Cir. 1989). However, where the witness' refusal to answer relates only to collateral matters, such as credibility, there is little danger to the defendant. *Zapata*, 871 F.2d at 624. It is within the district court's discretion to strike a balance between the defendant's confrontation right and the witness' privilege against self-incrimination, and shall be reversed only upon a finding that the district court abused its discretion. *Id.*

At trial, Schafer testified that he was the subject of a counterfeiting investigation, that he had agreed to cooperate with the government, and that he had waived the statute of limitations for six months. When questioned about whether he had fabricated or falsified any documents, Schafer then invoked the fifth amendment. Based on this testimony, the jury was aware that Schafer was the subject of a counterfeit investigation and that the charge hung over him like "a sword of Damocles". As a result, the jury had sufficient information to make a discriminating appraisal of Schafer's motive and bias. Further questioning on cross would have been fruitless here, where Schafer had invoked his fifth amendment rights concerning the merits of the charge. In striking this balance between Kaufmann's right to confrontation and Schafer's privilege against self-incrimination, the district court did not abuse its discretion.

F. Exclusion of Subsequent Revisions to IRS Form 8390

The IRS Form 8300, "Report of Cash Payments Over $10,000 Received in a Trade or Business," was revised in 1985, and was used by Kaufmann in the transactions identified in the indictment. The form was again revised in January, 1990. Kaufmann, however, was unaware of the revision at the time of the attempted sale charged in count five. At trial, he sought to introduce the revised form and instructions, but the court rejected them as irrelevant. Kaufmann contends that the form was more comprehensive and clearer, in response to substantial confusion among dealers as to their duties in reporting. Kaufmann argues that it was error to reject this material, apparently on the theory that it may have helped him show excusable misunderstanding with respect to his duties in preparing and filing the form.

Counts one to four charged Kaufmann in part with knowing that the transactions were designed to avoid a transaction reporting requirement under federal law. Those counts under § 1956(a)(1)(B) are not before us. Count five, under § 1956(a)(3)(B), does not charge him with an intent to avoid a transaction reporting requirement. Kaufmann argues only generally that this material would be relevant to count five as well, and fails to suggest any particular change in the form or instructions which aid him in raising a reasonable doubt about his intent to conceal. Because the revisions were not relevant to count five, exclusion could not have been in error as to that count.

We note that on the form Kaufmann was preparing for the "sale" with Myre, he would have reported Ahern (using the alias Adams) as the "Individual or Organization for Whom this Transaction Was Completed." The revised form used the terms "Identity of Individual From Whom the Cash Was Received." The evidence clearly demonstrates that Kaufmann was willing to report Ahern as the person purchasing and paying for the vehicle. Such willingness tends to prove his intent to conceal the fact that the funds and car belonged to Myre.

G. Sentence Enhancement/Obstruction of Justice

At sentencing, the district court gave Kaufmann a two-point enhancement for obstruction of justice. Section 3C1.1 of the United States Sentencing Guidelines provides:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

The commentary to the Sentencing Guidelines includes the following as examples of conduct to which the enhancement applies:

> (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
>
> * * *
>
> (f) providing materially false information to a judge or magistrate;
>
> (g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense[.]

The term "material," as used §3C1.1, means "evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination." Application Note 5 to § 3C1.1.

The probation department recommended a two level enhancement for obstruction of justice based on three considerations and the district court agreed. A sentencing court's determination that a defendant obstructed justice is a finding of fact which is reviewed on appeal under a clearly erroneous standard. *United States* v. *Easley*, 977 F.2d 283, 286 (7th Cir. 1992); *United States* v. *Casanova*, 970 F.2d 371, 377 (7th Cir. 1992). On appeal,

we defer unless we are left with a definite and firm conviction that a mistake has been committed. *See United States* v. *Caicedo*, 937 F.2d 1227, 1233 (7th Cir. 1991).

First, the district court found that Kaufmann threatened Schafer in an effort to intimidate him. Two days after the "sting operation," Kaufmann told Schafer that he was concerned that he might be in some legal trouble. Kaufmann stated, "I don't want to get involved with something and I would take a personal vendetta against somebody that got me involved and I have enough money to cause a guy some hardship." This conversation was audiotaped. The court found that Kaufmann's statement "would have the impact of intimidating to some degree Schafer." Tr. at 1111. Obstruction of justice need only be found by a preponderance of the evidence. The district court's finding that Kaufmann had threatened Schafer was not clearly erroneous.

Secondly, the district court adopted the probation department's recommendation that an enhancement for obstruction of justice was appropriate in light of Kaufmann's testimony regarding untaped discussions he had with Schafer — discussions concerning Myre's real estate dealings and pending divorce. The PSI provided, "Mr. Kaufmann provided a false explanation for his understanding of the facts regarding where the money came from. He falsely alleged Mr. Schafer said things which the tapes revealed he had not said." Concerning this factor and the third factor (discussed below), the court commented:

> The other two testimonial aspects of the enhancement for obstruction enhancement of justice are ones that I think exist. I am not sure how important they were to the aspect or to the prosecution of the case but all things considered, the court is going to and does decline to remove the two point enhancement for the obstruction enhancement of justice.

Tr. at 1111-12 The district judge also signed the judgment and marked to indicate, "The court adopts the factual findings and guideline application in the presentence report." An attached

statement showed that the court refused one possible enhancement, but did "assess 2 points for 'obstruction of justice' as set forth in the PSI . . . " Kaufmann contends that the district court effectively delegated its fact finding function to the probation department when it "decline[d] to remove" the two point enhancement.

False testimony as to a material fact is subject to an enhancement at sentencing. *United States* v. *Barnett*, 939 f.2d 405, 408 (7th Cir. 1991). Where the record does not clearly demonstrate that the jury *must* have concluded that the defendant told a material lie on the stand, *United States* v. *Lozoya-Morales*, 931 F.2d 1216, 1220 (7th Cir. 1991) (emphasis in original), the district court must make a specific, independent finding that the defendant was less than truthful when he testified, and that he had a "conscious purpose" to obstruct justice. *Easley*, No. 89-3190, slip op. at 6 (citing *United States* v. *Davis*, 938 F.2d 744, 747 (7th Cir. 1991)). *Id.* We do not read the judge's statements as suggesting that he failed to independently consider the appropriateness of the enhancement. Although the district court did not explicitly state his findings on the record at sentencing, we believe his statements then and in the judgment are tantamount to a finding. His decision to rely on the information in the PSI rather than believe Kaufmann's assertions was essentially a judgment of Kaufmann's credibility. "We defer to the [sentencing] court's . . . credibility determinations unless they are without support in the record . . . ." *Brown,* 944 F.2d at 1379; *quoted in Beal*, 960 F.2d at 634. The district court had ample support in the record to support its conclusion that Kaufmann made material misstatements while under oath. The court's discretion to apply a two-point enhancement for obstruction of justice on this and the first ground was not clearly erroneous.

However, the district judge did not attach a written record of such findings to the PSI, as required by Federal Rule of Criminal Procedure 32(c)(3)(D). Rule 32(c)(3)(d) requires the court to respond to the matters controverted either by making (1) a finding as to each allegation or (2) a determination that the

disputed matter will not be relied on for sentencing. *United States* v. *Pless,* Nos. 91-3418 & 91-3666, slip op. at 17 (7th Cir. Dec. 18, 1992); *United States* v. *Coonce*, 961 F.2d 1268, 1277 (7th Cir. 1992); *United States* v. *Jewel,* 947 F.2d 224, 234 (7th Cir. 1991). The rule also provides that a written record of the court's findings or determination must be attached to the presentence report and thereafter made available to the Bureau of Prisons. Fed. R. Crim. P. 32(c)(3)(D). This provision serves two purposes: "(1) to ensure that the court deals with and responds to a defendant's PSI objections before sentencing him or her; and (2) to provide prison and parole authorities with a clear record of how such disputes were resolved[.]" *Pless,* Nos. 91-3418 & 91-3666, slip op. at 17 (citing *United States* v. *Eschweiler*, 782 F.2d 1385, 1387-88 (7th Cir. 1986)).

As discussed above, Judge Warren's statements on the record concerning the enhancement for obstruction of justice were sufficiently specific to constitute factual findings under Rule 32(c)(3)(D). However, the second purpose of the rule has not been served. From the record before us, it is not apparent that the court provided an attachment to the PSI detailing the resolution of the disputed matters. Therefore, although resentencing is unnecessary, we remand for the limited purpose of directing that the findings of the court be appended to the PSI for the benefit of the Bureau of Prisons and others who later may need to rely on these findings. *United States* v. *Villasenor,* 977 F.2d 331, 338-39 (7th Cir. 1992); *Pless,* Nos. 91-3418 & 91-3666, slip op. at 18.

And finally, Kaufmann challenges the district court's reliance on statements made by Kaufmann during the sting operation. The PSI set out the following facts:

> Throughout his dealing with Agent Myre, it was obvious Agent Myre, not Agent Ahern had carried the money into Kaufmann's office and controlled the money. Agent Myre testified he brought the briefcase of money into the office, placed it next to his chair on

> the side away from Agent Ahern, picked up the suitcase and opened it in front of Mr. Kaufmann to reveal the money, took the money out of the briefcase and handed it to Mr. Kaufmann for counting. All the discussion regarding money was between him and Mr. Kaufmann.

However, when asked by the "arresting" officers, Kaufmann denied knowing which agent (Myre or Ahern) was handling the money. The district court found that Kaufmann's conduct warranted an enhancement for obstruction of justice.

The commentary to the Sentencing Guidelines specifies a number of examples of conduct that does not warrant application of the enhancement. Application Note 4(b) provides that enhancement is not appropriate where a defendant makes "false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies[.]" Under Application Note 3(g), enhancement is appropriate where the defendant makes "a materially false statement that significantly obstructs or impedes the official investigation or prosecution of the instant offense." The government concedes that the statement did not hinder its investigation. Appellee's Brief, at 46; Tr. at 1090. However, because we uphold the enhancement based on the district court's other two findings, we need not remand for re-sentencing.

For the foregoing reasons, the jury's conviction and the district court's sentence are AFFIRMED. We remand only for the limited purpose of the district court's compliance with the attachment provision of Rule 32(c)(3)(D).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 90-CR-172

HARRY C. KAUFMANN,

Defendant.

ORDER

Harry C. Kaufmann ("Defendant") was tried by a jury on five counts of money laundering under 18 U.S.C. § 1986(a). On March 22, 1991, the jury found defendant not guilty on Counts One and Two and guilty on Count Five. The jury was unable to reach a unanimous verdict on Counts Three and Four. Now before the Court is defendant's motion to dismiss, or, alternatively, for judgment of acquittal with respect to Counts Three and Four and defendant's motion for judgment of acquittal or, alternatively, for a new trial with respect to Count Five.

I.
Standards of Review

A. Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29

Rule 29 states that a court shall order the entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the offenses alleged against defendant. The Seventh Circuit has held that the standard that a court must use is whether there is "relevant evidence from which the jury could reasonably find [the defendant] guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government . . .

bear[ing] in mind that it is the exclusive function of the jury to determine the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences." *See United States* v. *Marquardt,* 786 F.2d 771, 780 (7th Cir. 1986) (quoting *United States* v. *Blasco,* 581 F.2d 681, 684 (7th Cir.), *cert. denied*, 439 U.S. 966 (1978).

B. Motion for a New Trial Pursuant to Fed.R.Crim.P. 33

Rule 33 states in part:

> The court on motion of defendant may grant a new trial to him if required in the interest of justice.

Generally, a court may declare a mistrial whenever the circumstances indicate a manifest necessity to do so in order to further the ends of justice. A mistrial is generally declared when the impartiality of the jury is irretrievably impaired by errors of misconduct. Federal Procedure, §§ 22:821, 22:822 (Lawyers Ed. 1982)

. . . .

III.
Count Five

Defendant was convicted on Count Five. Accordingly, he requests the Court to order a judgment of acquittal under Rule 29(c) or, in the alternative, a new trial pursuant to Rule 33. He asks for this relief based upon a series of legal and factual arguments. First, he states that this Court improperly denied his counsel adequate confrontation and cross examination of Informant Thomas Schafer. Second, defendant states that he was improperly denied the right to present the testimony of James "Sonny" Harrison. Third, he argues that the government failed to prove that Schafer was authorized to act as a law enforcement officer. Fourth, defendant states that the government failed to prove that the proceeds represented were from specified unlawful activity. Finally, he asserts that the Court's

jury instructions on knowledge and related issues were erroneous.

A. Confrontation and Cross Examination of Schafer

Defendant first argues that this Court should have precluded or struck the testimony of Informant Schafer once he asserted his fifth amendment rights. In the alternative, defendant argues that his counsel should have been allowed to more fully cross examine Schafer and to present witnesses and evidence to show his bias and untruthfulness.

Mr. Schafer entered into an agreement with the IRS to act as an informant. Pursuant to this agreement, he communicated certain information to defendant and recorded his conversations with defendant. Mr. Schafer entered into this agreement with the hope of obtaining some consideration from the government with regard to possible counterfeiting charges against him. At trial, Mr. Schafer, on the advice of counsel, stated his intention to refuse to answer questions regarding his criminal activity. This criminal activity included counterfeiting as well as other activity. He was voir dired on this subject outside the presence of the jury and refused to answer questions about various allegations of criminal conduct. The defense argues, that Schafer's refusal to answer these questions required the striking of his direct testimony or the granting of a mistrial. The defense states that the failure to strike Mr. Schafer's testimony or grant a mistrial resulted in a denial of his right to confrontation.

When a witness asserts his fifth amendment rights in refusing to answer certain questions on cross examination, an issue may be raised as to whether the Confrontation Clause entitles the examining party to remedies. The most commonly sought remedies are to strike the witness' direct testimony or to declare a mistrial. In determining if these remedies should be granted, a court must first decide whether the fifth amendment privilege has been invoked as to matters collateral to the witness' direct testimony.

> Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness' testimony may be used against him. On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness' testimony should be stricken in whole or in part.

Dunbar v. *Harris*, 612 F.2d 690, 692 (2d Cir. 1979); *see also United States* v. *Gullett*, 713 F.2d 1203, 1208-1209 (6th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

Courts have consistently held that a question is collateral when it relates only to credibility and does not directly concern the subject matter of the witness' direct testimony. *See e.g., United States* v. *Zapata*, 871 F.2d 616, 623 (7th Cir. 1989). Courts, however, have generally held that a witness' bias is not a collateral matter.[6] *See, e.g., United States* v. *Anderson*, 881 F.2d 1128 (D.C. Cir. 1989).

> "Bias is never classified as a collateral matter which lies beyond the scope of inquiry, nor as a matter on which an examiner is to take a witness' answer. Bias may be proved by extrinsic evidence . . .

Id. at 1139.

In our case, Mr. Schafer's possible bias related to his agreement with the government to cooperate in this case in return for a consideration on possible counterfeiting charges. In this Court's ruling with respect to Mr. Schafer's testimony, it recognized the possibility of this bias. Nonetheless, this Court admitted his direct testimony because the jury was made aware of his agreement with the government via the introduction of that agreement into evidence and because Mr. Schafer's personal

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[6] The Seventh Circuit has not addressed this question.

credibility was not an important issue in this case. As the government notes, Mr. Schafer was not really a fact witness in this case. During the sting operation, the government used him to communicate certain information to defendant and to record his conversations with defendant about that information. At trial, he merely testified to the authenticity of the tapes of their conversation.

Defendant's attempted inquiry into other alleged criminal activity of Mr. Schafer was not relevant to his bias since he did not make an agreement with the government with regard to these other crimes. Mr. Schafer's other criminal activity merely related to his prior bad acts and to his credibility. As such, it was irrelevant and collateral. *See Zapata infra.*

. . . .

C. Whether Schafer Was Authorized to Act As a Law Enforcement Officer

Defendant next argues that this Court erroneously instructed the jury with regard to the statutory definition of "represented" and that there was insufficient evidence to prove that Schafer was acting at the direction of federal law enforcement officers.[7]

This Court employed the statutory language of 18 U.S.C. § 1956(a) (3) when it defined the term "represented." That

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[7] In his response letter, defendant's counsel argues that this Court improperly cutoff his questioning of IRS Special Agent Timbers regarding changes in the Form 8300 and its instructions. Defendant's counsel states that this Court improperly excluded the evidence under the subsequent remedial measures evidence rule. *Fed.R.Evid.* 407. As defendant's counsel notes, Rule 407 may not apply to criminal cases. *See United States* v. *Gallagher,* 990 U.S. Dist. LEXIS 4822 (E.D. Pa. April 25, 1990). Accordingly, it may not have been proper for this Court to limit defense counsel's questioning of Agent Timbers pursuant to *Fed.R.Evid.* 407. Nonetheless, defense counsel's questioning of Mr. Timbers with respect to changes in the Form and its instructions did not inquire into matters relevant to the trial. Defendant's actions occurred under the old Form 8300 and its instructions, not the revised 1990 Form 8300. Accordingly, this Court's limitation on defense counsel's questioning was proper.

statutory definition is a correct statement of law. Accordingly, this Court does not believe that it made an erroneous instruction with respect to the term "represented."

This Court also finds that there was sufficient evidence for the jury to find that Mr. Schafer was acting at the direction of, or with approval of, federal officials. Mr. Schafer testified that he was acting at the direction and with approval of federal law enforcement officials. In addition, his testimony was corroborated by two IRS agents. Mr. Schafer testified that he had been provided a story to tell defendant by IRS agents who were supervising the investigation. IRS Special Agent James Ansier verified that he met with Schafer regarding the investigation. IRS Special Agent Craig Myer, who served in an undercover capacity as Schafer's drug dealer friend, verified that he met with Schafer briefly to discuss aspects of the story he would be relating to defendant.

Defendant notes, however, that he testified that Mr. Schafer engaged in untaped discussions with him about real estate deals and the divorce of undercover agent Myer. Defendant asserts that these conversations were not authorized by Myer. Defendant may be correct that any discussions regarding real estate and divorce were not authorized by the special agents. However, since defendant's testimony regarding these conversations was uncorroborated, the jury reasonably could have found it to be unbelievable. Moreover, even if the jury found defendant's testimony to be credible, it could have reasonably found that Mr. Schafer was acting at the agent's direction with respect to his representation that the money was the proceeds of specified unlawful activity.

D. Whether the Proceeds Were Represented To Be From Specified Unlawful Activity

Defendant argues that the government failed to prove that the money offered him was represented to be the proceeds of specified unlawful activities. The defense bases this argument upon the fact that no one specifically told him that the money

involved in the purchase of the automobile was the proceeds of specified unlawful activity.

As the government notes, defendant's argument mistakenly assumes that the statute requires that a law enforcement official or his agent specifically state that the money is the proceeds of specified unlawful activity. The record includes strong circumstantial evidence which could support a jury finding that Mr. Schafer made representations that the money was the proceeds of such activity. Mr. Schafer told defendant that he had a friend who was interested in buying a $40,000 Porsche but had to pay cash for the car and had to have it titled in someone else's name. Moreover, Mr. Schafer stated that his friend was a "marijuana dealer." Finally, Mr. Schafer's story was confirmed by a letter from the friend provided to Schafer and passed on to defendant. This letter stated that the individual selling the car had to be "cool about my business." These circumstances taken in combination provided strong circumstantial evidence which would allow a reasonable jury to find beyond a reasonable doubt that Mr. Schafer and Agent Myer represented to defendant that the money involved in the purchase of the car was the proceeds of specified unlawful activity.[8]

. . . .

III.
Summary

Under the foregoing reasoning, this Court **DENIES** defendant's Motions After Discharge of Jury.

SO ORDERED this 31st day of May, 1991, at Milwaukee, Wisconsin.

ROBERT W. WARREN
United States District Judge

[8] In addition, the statements of defendant indicate that he knew that the buyer was a drug dealer. For example, in his March 29, 1990 meeting with Myer, defendant stated that he knew the money was coming in cash and expected a mixture of bills.